Filed 4/19/10 P.v. Crosby CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN LEE CROSBY, Defendant and Appellant.	F056070 (Super. Ct. No. SUF30174) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Carol K. Ash, Judge.

David Joseph Macher, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Sarah J. Jacobs, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE DISSENTING OPINION OF GOMES, J.

After the car he stole ran out of gas in Santa Nella, defendant Benjamin Lee Crosby told an elderly man who was a guest at a nearby motel that his headlights were on. The man left his room, leaving his door open, and defendant, with a crowbar in his pants, went inside. As soon as the man returned, defendant beat him over the head with the crowbar, put a plastic bag around his head, and pulled his eyeglass cord around his neck until he died. He stole the man's car and drove away. He later set fire to the car. A jury found him sane. The court imposed a sentence of life without possibility of parole, together with concurrent determinate sentences on other counts.[1]

On appeal, defendant argues prejudice from (1) the court's denial of his motion for a mistrial on the ground of jury misconduct, (2) the mere acquiescence of one juror in the verdict, (3) the court's denial of his new trial motion on the ground of jury misconduct, (4) cumulative error, and (5) the court's imposition of a parole revocation fine.

BACKGROUND

On January 10, 2008, the district attorney charged defendant by amended information with murder (count 1; Pen. Code, § 187, subd. (a)),[2] first degree burglary (count 2; § 459), robbery perpetrated in an inhabited dwelling (count 3; §§ 211, 212.5, subd. (a)), carjacking (count 4; § 215, subd. (a)), receiving stolen property (count 5; § 496, subd. (a)), and arson of personal property (count 6; § 451, subd. (d)). The information alleged defendant committed the murder by personal use of a deadly or dangerous weapon (§ 12022, subd. (b)), by lying in wait (§ 190.2, subd. (a)(15)), during a robbery (§ 190.2, subd. (a)(17)(A)), during a burglary (§ 190.2, subd. (a)(17)(G)), and during a carjacking (§ 190.2, subd. (a)(17)(L)).

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[1] Since defendant withdrew his not guilty plea and went to trial solely on the basis of his not guilty by reason of insanity plea, the court imposed sentence once the jury found him sane. (Pen. Code, §§ 1016, subd. 6, 1026, subd. (a); *People v. Walker* (1948) 33 Cal.2d 250, 260.)

[2] All statutory references are to the Penal Code unless otherwise noted.

After pleading not guilty and denying the allegations, defendant withdrew his not guilty plea and entered a not guilty by reason of insanity plea on July 9, 2008. During the change of plea proceedings, the prosecutor stated that if the jury were to find defendant sane his office would not seek the death penalty. On July 31, 2008, a jury found defendant sane.

On September 4, 2008, the court sentenced defendant to life without the possibility of parole on the special circumstance murder (count 1) and to concurrent determinate terms of four years (midterm) on the first degree burglary (count 2); four years (midterm) on the robbery of an inhabited dwelling (count 3), stayed (§ 654); nine years (aggravated term) on the carjacking (count 4); two years (midterm) on the receiving stolen property (count 5), stayed (§ 654); and two years (midterm) on the arson of personal property (count 6).

DISCUSSION

A. Additional Facts Concerning Jury Deliberations

Among the instructions the court gave was CALCRIM No. 3450, which cautions the jury, in relevant part, "You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way." During deliberations, the foreperson sent the court the following note:

> "Your Honor, we, the jury of 11, have come to a decision. One juror, No. 8, (name redacted), cannot understand the process of defense and prosecution.
>
> "We would like her to maybe gain a better understanding by you as to why she needs direction on what we are to determine."

The court queried the foreperson outside the presence of the jury in the presence of the prosecutor and defendant's attorney:

> "THE COURT: … Can you explain a little bit further what's causing you concern as far as --

"JURY FOREPERSON: Um, it seems like she's in a shell, that she understands everything that went on but is just adamant about her decision of the opposite of everyone else. She thinks we're kind of ganging up on her, but we're not. And we've tried every which way to make her understand. We've gone over evidence. We've gone over instruction, evidence, more instruction, more evidence, more instruction. Uh, we've talked about things that we all did in the world and we've tried, and she's just adamant about not agreeing with us.

"THE COURT: Okay. And so she has actually participated in the deliberations?

"JURY FOREPERSON: Yes.

"THE COURT: She's discussed the case with you?

"JURY FOREPERSON: Yes.

"THE COURT: Okay.

"JURY FOREPERSON: And she explained her view and, uh, I've asked her to explain what she thought was wrong and then we can -- we can all talk about that, but a lot of people are interrupting her and so she's climbed into a shell and she's stuck there.

"THE COURT: Okay. And, at this point, is she refusing to discuss it further or --

"JURY FOREPERSON: Yes.

"THE COURT: Okay. Is there anything either counsel wanted to --

"JURY FOREPERSON: I think if she understood more about the legal definitions, I think --

"THE COURT: Unfortunately, we're pretty much bound by the jury instructions as far as further talk with her about that, but I mean that's something we could consider.

"But I don't know if either counsel had a question.

"[DEFENSE COUNSEL]: Though the question, as you phrased it, says that she doesn't understand the -- was words to the effect of the roles of the prosecution and defense.

"JURY FOREPERSON: Yes.

"[DEFENSE COUNSEL]: Could you elaborate on that a little bit.

"JURY FOREPERSON: Uh, she understands that you brought in professionals.

"[DEFENSE COUNSEL]: Um-hum.

"JURY FOREPERSON: And that the Court has recognized them as professionals and that their opinions are -- have a lot of weight here. She understands that. She thinks Prosecuting is, uh, didn't do anything and we kept telling her that all he has to do is produce the facts and tangible items; photographs and police reports. That's his role. And I think she's confused.

"THE COURT: So as far as the burden of proof, you think maybe she's confused regarding that? Have you talked with her about that?

"JURY FOREPERSON: We've tried all different angles, and she's just --

"THE COURT: Okay.

"JURY FOREPERSON: Even her body language (indicating), she's done this (indicating) and she's shut us off.

"THE COURT: Okay. I'll note the foreperson showed that she was putting her legs up next to her --

"JURY FOREPERSON: Yes.

"THE COURT: -- next to her body, kind of like in a fetal position.

"JURY FOREPERSON: Yes, she folds up and she balls up and she doesn't want to participate. And I talk to her. I know her name's (name redacted). And I talk to her and everything, and I've gone a whole circle on trying to get her to disregard what we think. 'What do you think?' And we've even -- all have talked about putting the crime aside, the matter of insanity, and, uh, she still doesn't want to hear it.

"THE COURT: Okay.

"[PROSECUTOR]: I guess my only concern, at this point, is you've indicated that when she, uh -- when she tried to explain, she was interrupted, and so now she's climbing into a shell. And I'm wondering if some control over the rest of the jurors would allow her to get out of her shell and deliberate.

"JURY FOREPERSON: And I did do that. I did this for my -- I did ask everybody to let her explain, and she said, 'I already did. You interrupted me.' It's not that we interrupted her, it was everybody was having their own little conversations with one or two people at the other end of the table, and she felt that she would be interrupted because nobody stopped and listened to her.

"[PROSECUTOR]: I see.

"THE COURT: Okay.

"JURY FOREPERSON: And so I told everybody let's -- we had two people at first and then we asked her to show us what you didn't buy or did buy and -- in the evidence.

"THE COURT: And did she do that?

"JURY FOREPERSON: No. She's reverted back to we interrupted her and she's done (hand motion)."

At that juncture, without objection by either counsel, the court let the jury foreperson return to the jury room and brought in Juror No. 8 for questioning:

"THE COURT: … [¶] And, I guess, the foreperson was concerned you're not participating in the deliberations, and we want to get your viewpoint. Don't feel like you're put on the spot or anything. But how do you feel things are going?

"JUROR NO. 8: Well, I feel like they're -- a lot of 'em are concerned as to what's going to be the outcome. Well, you know, if we all say this, where is he gonna go, and if we say this, then he's going to go to this place, but he can get out of this place. And that was one of the things I thought you had mentioned, that we shouldn't consider what it is that's gonna happen, um, regarding our position. And, um, I mean it just seems like --

"THE COURT: Now, are you, at this point, feeling like you can discuss the case with the other jurors?

"JUROR NO. 8: Yes. I have discussed with them, but at the same time, you -- well, it was two of us that had a different opinion than the other ten of 'em, and she was like, well, you know what, at this point in time, ten of 'em feel one way and it is just the two of us that feel the other. And I'm like, okay, so what are you trying to say? She said, well, you know, we have to make a decision. And I said, well, I feel strong about my decision. So I don't feel like I should just should change my mind and go to heck with it.

"THE COURT: No, and you shouldn't.

"JUROR NO. 8: So does that mean that if everybody else goes and jumps off the cliff, and I said, no, I'm not going to do it, and I said, well, I feel strong about my decision too and we have to make a decision and why

don't we just -- and I'm like, no, I'm sorry, I feel strong about my decision and I don't feel -- and every time I try to say something everybody just goes, (noise with mouth), because I'm going the other way.

"And she has the exact same concern that I do, but, at the same time, it's like, well, every time I say something, she agrees with me and she agrees with me, and then, as soon as the other ones ask her, she's like, well, you know, I still feel this, but if you have to make a decision, then I'm willing to agree with you guys, and it's like (hand motion). I mean, she's allowed to do whatever she wants, but, at the same time, I'm not one of those that, okay, you jump; off the cliff, I jump off the cliff.

"And I have listened to them and I told them, okay, I was one of them and that I went back and forth and I went back and forth. And if they came in here and said whatever either way, just from the beginning, and didn't listen to anything that was being said by either the Defense or the District Attorney, then, you know, they might have been biased or they shouldn't have been here.

"I was one of those that went back and forth, back and forth just trying to weigh what was said and what was not said, and things like that. And I already did that, went back and forth, and I already came to my conclusion and my decision, and I feel like --

"THE COURT: Now did you keep --

"JUROR NO. 8: -- they're --

"THE COURT: -- keep an open mind as far as going into the deliberation room --

"JUROR NO. 8: Yes.

"THE COURT: -- and listening?

"JUROR NO. 8: Oh, yes.

"THE COURT: You didn't reach your decision before you went into the --

"JUROR NO. 8: No. No.

"THE COURT: -- jury room?

"JUROR NO. 8: I mean we were all talking and I actually was one of the last ones to go because we went around the table. And I was one of the last ones to go and had my chance to, like, listen to what she said, what they all had to say. But when it came time for me to say something, I still felt strongly about my decision. So --

"THE COURT: And did you feel you had a chance to say what you wanted to say?

"JUROR NO. 8: Not really.

"THE COURT: Okay.

"JUROR NO. 8: 'Cause as soon as I mentioned which way I was kind of leaning towards, everybody kind of just shut me down and started just like throwing things.

"THE COURT: Okay.

"JUROR NO. 8: And --

"THE COURT: Once --

"JUROR NO. 8: I'm sorry. Go ahead.

"THE COURT: I'm sorry. What do you understand regarding the process? It sounds like you understand the process; you understand in this case the Defense does have the burden of proof to prove it more likely than not.

"JUROR NO. 8: Um-hum.

"THE COURT: And you don't have a problem with that?

"JUROR NO. 8: Hum-um.

"THE COURT: Okay. I want to make sure you understood the process.

"And did you have something else you wanted to say?

"JUROR NO. 8: No, it was that.

"THE COURT: Did you have anything you wanted to ask, [defense counsel]?

"[DEFENSE COUNSEL]: It seems from her initial responses that she was saying that, in her view, the other members of the jury were disregarding the Court's instructions. And so I -- I thought it would be appropriate to ask her something along the lines of, um, is that what's going on or are they actually discussing and considering the facts that are presented in the case.

"THE COURT: Which is the part that's causing a concern. I missed that point. I get the point -- the point you're making, I guess.

"[DEFENSE COUNSEL]: The point I'm making is she was saying -- I understood her to say that they were disregarding the instruction not to consider what comes up after.

"THE COURT: Oh, the penalty or punishment.

"[DEFENSE COUNSEL]: Yeah. Yeah.

"THE COURT: So …

"[DEFENSE COUNSEL]: And whether they're deliberating upon the facts of the case or whether they're -- I mean, they could probably do it both. I don't know.

"THE COURT: And so you're saying there was discussion about what would happen.

"JUROR NO. 8: Um-hum. Ever since they relayed that, okay, I have a different opinion than most of 'em, they've been like, 'Well, you

know, have you considered what it is that would happen?' And I'm like, 'Well, I don't think we're supposed to consider that. I don't think that, you know, he -- I was pretty sure that the judge said that we are not supposed to consider that kind' --

"THE COURT: Various confinements.

"JUROR NO. 8: And it is all of them have mentioned their opinion as to, okay, well, if he does this, he's going to go to this and he's just, you know, he's still gonna receive care here and whatever, whatever, whatever may be the case. They're still going to take care of him. But if he goes to this place, it's just going to be to that place, and then he's going to have time -- you know, he may have a chance to be free later on.

"And, then, one of 'em even mentioned -- am I allowed to, like, speak anything specific about what they said over that I thought kind of made a lot of people, I guess, make up their mind and things like that?

"THE COURT: Okay.

"JUROR NO. 8: Well, one of them specifically mentioned a case where -- there was some strangler case where he had strangled a whole bunch of women or whatever and he said that brought up -- you know, he said, I kept going back and forth, but then I thought about this one case, who is the strangler who used to strangle all these women, blah, blah, blah, and then they found him to be insane. And, then, later on, after they already placed the judgment saying he was insane, he was free to go or whatever the case may be that happened, how they found a whole bunch of books about psychology and how he fooled all the psychologists and things like that, so basically helped me make up my mind.

"And I'm like, 'Did you just realize what you said? That has nothing to do with this. It was a completely different case. It has nothing

to do with what you just mentioned and this is somebody else. It's not the same person, so' …

"THE COURT: And what juror number was it that said that?

"Do you remember?

"JUROR NO. 8: The foreman."

After the court, without objection by either counsel, let Juror No. 8 return to the jury room, a colloquy ensued. The court suggested, and the prosecutor agreed, that the jurors return for reinstruction "not to consider any penalty or punishment." The prosecutor suggested that the court reinstruct that the defense, not the prosecution, has the burden of proof and admonish the jurors "to calmly and without interruption listen to each person's position and begin deliberations afresh." Defendant's attorney made a motion for a mistrial on the ground of jury misconduct, arguing that the foreperson's discussion of a case involving a strangler who was free to go after a jury found him insane because he fooled all the psychologists constituted consideration of matters outside the record. The court again brought in the jury foreperson for additional questioning:

"THE COURT: We're again speaking with the jury foreperson.

"And Juror No. 8 mentioned that someone had made some discussion regarding a strangler who had been committed to a hospital or was found insane and at some point was released.

"Did you hear discussion of that during the deliberations?

"JURY FOREPERSON: No. No, that wasn't how it went at all.

"THE COURT: What do you recall?

"JURY FOREPERSON: I was the one who said it. I said I was watching TV where they had this, uh, guy who was on trial and, uh, he fooled the psychiatrist and that, um -- and later on it was discovered that this guy, who had psychology books in his basement, and he read enough

and knew enough to fool the psychiatrist and disgraced the psychiatrist. The psychiatrist quit his private practice and went to work at a prison.

"THE COURT: Okay.

"JURY FOREPERSON: That's what the story was.

"THE COURT: I just wanted to clarify that.

"And, also, has there been discussion about what would happen to the defendant if he -- you know, if either finding was made, either sanity or insanity?

"JURY FOREPERSON: Yes. Yes.

"THE COURT: Okay. And there is the instruction that you're not to consider what would happen. So what I'm thinking I'll probably need to do is reinstruct the jury on that matter, so if there have -- has been discussions that if he was found sane, this would happen, and if he's found insane, this would happen.

"JURY FOREPERSON: Yes.

"[PROSECUTOR]: Well --

"THE COURT: Do you agree with that?

"[PROSECUTOR]: Yes. I think we need to clarify one thing, with respect to the strangulation thing is that in respect to what would happen to the defendant or some --

"JURY FOREPERSON: No. That was to show that the psychiatrist's opinion means a lot but they can be fooled. It was in relation to people lying.

"[PROSECUTOR]: I understand. Thank you.

"THE COURT: That's what I took it to mean.

"[Defense counsel]?

"[DEFENSE COUNSEL]: No questions.

"THE COURT: And you can go back into the room.

"JURY FOREPERSON: Okay."

After the jury foreperson left, the court told counsel that the jury would be reread "the insanity instruction, which does include that they're not to consider what happens to them, although it tells what would happen, but they are not to consider that in any way. But it also has burden of proof in it. And then I'd also read the instruction to, you know, consider everyone's opinion and have them re-deliberate." The court denied defendant's motion for a mistrial, saying, "I think what he related doesn't result in jury misconduct." Before the jury returned, defense counsel suggested, "And to address the initial concern, maybe you should read the instruction about how jurors should approach the task." Once the jury returned, the court reread CALCRIM No. 332 ("Expert Witness Testimony"), CALCRIM No. 3450 ("Insanity: Determination, Effect of Verdict (Pen. Code, §§ 25, 25.5)"),[3] and a single paragraph from CALCRIM No. 3550 ("Pre-Deliberation Instructions").[4] The jury immediately adjourned for lunch. After lunch, the jury commenced deliberations at 1:29 p.m. Exactly 15 minutes later, at 1:44 p.m., the bailiff informed the court that the jury had reached a verdict.

B. Denial of the Mistrial Motion

We review the denial of a motion for mistrial pursuant to the abuse of discretion standard of review. "A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Bolden*

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[3] The relevant sentence from CALCRIM No. 3450 states: "You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way."

[4] The relevant paragraph from CALCRIM No. 3550 states: "Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other."

(2002) 29 Cal.4th 515, 555.) Here, the trial court concluded that the jurors' actions did not rise to the level of misconduct and that the situation could be corrected by reinstructing the jury on the relevant issues.

As the Supreme Court recently stated in *People v. Dykes* (2009) 46 Cal.4th 731, 811, juror discussion of punishment is to some extent inevitable. Discussion of the issue is particularly likely in the context of a sanity trial, since the instructions alert the jury to the possibility that the defendant may be released upon restoration of sanity. Because it is inevitable and difficult to control, such discussions in themselves are not usually deemed jury misconduct. (*Id*. at pp. 811-812; see also *People v. Schmeck* (2005) 37 Cal.4th 240, 306-307.) In other cases, the Supreme Court has accepted trial court determinations that such discussions are jury misconduct but that the misconduct was not prejudicial on the facts of the case. (See, e.g., *People v. Loker* (2008) 44 Cal.4th 691, 749-750 [death penalty jury discussed cost of life imprisonment versus cost of execution]; *People v. Tafoya* (2007) 42 Cal.4th 147, 191 [juror discussed with his priest the Catholic Church position on death penalty, then reported that position to fellow jurors; misconduct not prejudicial where juror removed and jury reinstructed].)

In the present case, it appears the jury's discussion of the prospect of defendant's release after restoration of sanity was prolonged and heated enough that it should be considered misconduct. We independently consider whether the misconduct was prejudicial. (See *People v. Loker*, *supra,* 44 Cal.4th at p. 749.)

Jury misconduct is presumed to be prejudicial. That presumption may be rebutted by a reviewing court's determination, upon examination of the entire record, that there is no substantial likelihood that the defendant suffered actual harm as a result of the misconduct. (*In re Malone* (1996) 12 Cal.4th 935, 964.) Here, the misconduct was brought to the court's attention before the jury returned a verdict and the court acted immediately to appropriately reinstruct the jury. Once the jury had been readmonished not to consider defendant's placement or punishment, the jury quickly reached a

unanimous decision, affirmed by each juror when individually polled. There were no further complaints of acrimony or misconduct. As a result, any possible prejudice to defendant was cured. (See *People v. Zapien* (1993) 4 Cal.4th 929, 996.)

Defendant ignores the curative admonition by the trial court after the misconduct was reported. His opening brief states that "the jury's verdict was founded on punishment," a claim not supported by anything in the record. To the contrary, as previously noted, any prejudice was dispelled by the course of proceedings after the court became aware of the problem.

Defendant also contends briefly that the proceedings deprived him of his due process rights under the federal Constitution, because he was entitled to have the jury determine the sanity issue based on the merits, not on considerations of placement and punishment. The jury was instructed to determine the matter on the merits, and we presume it did so. (*People v. Pinholster* (1992) 1 Cal.4th 865, 925.)

C. Right to Unanimous Jury

Defendant next contends he was deprived of the right to a unanimous jury because Juror No. 8 reported that another, unidentified juror said that she agreed with Juror No. 8 but "then, as soon as the [majority jurors] ask her, she's like, well, you know, I still feel this, but if you have to make a decision, then I'm willing to agree with you guys …." Defendant says this shows the unidentified juror refused to deliberate or decide the case on the merits.

Assuming this issue was not waived by counsel's failure to raise it below, and to the extent that the matter is even subject to consideration under the limitations of Evidence Code section 1150, subdivision (a), the record shows that, after the jury was reinstructed, all jurors voted in favor of a sanity verdict. Each juror asserted that this was his or her verdict when individually polled.[5] Accordingly, the record does not support

[5] Evidence Code section 1150, subdivision (a), provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements

defendant's contention. We conclude he was not deprived of the right to a unanimous verdict.

D. Denial of New Trial Motion

Defendant contends the trial court should have granted his motion for new trial. The motion was supported by a declaration of defendant's trial counsel reporting the results of his posttrial interview with the jury foreperson. Counsel reported that the juror, an employee of the Department of Corrections "in charge of fire crews," stated that he had informed the other jurors that defendant would receive "good treatment" for his mental illness in the event the jury returned a verdict of sane.

The trial court rejected counsel's declaration as hearsay, inadmissible to impeach the verdict. The court stated that the essence of the foreperson's statement had been conveyed to the court at the time of the mistrial motion. The court stated that, looking at the record as a whole, there was no reason to believe the reinstructed jury had engaged in misconduct. Even if there were misconduct, in light of the reinstruction and the strength of the evidence of sanity at the time of the commission of the crime, the misconduct was not prejudicial.

Counsel's declaration was hearsay and added little to the information already before the court. (See *People v. Dykes, supra,* 46 Cal.4th at p. 810.) As we have concluded above, the record does not demonstrate that the jury's discussion of placement or punishment was prejudicial. The trial court did not abuse its discretion in denying the new trial motion. Similarly, the cumulative impact of the errors alleged in this case is not sufficient to have denied defendant a fair trial; in the absence of those errors, there is no reasonable likelihood of a verdict more favorable to defendant.

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made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

E. Parole Revocation Fine

Defendant contends the court erred in imposing upon him a parole revocation fine. Penal Code section 1202.45 requires imposition of such a fine when "a person is convicted of a crime and [the] sentence includes a period of parole." (The fine is "suspended" unless and until the defendant has been admitted to parole and such parole is then revoked. (Pen. Code, § 1202.45.)) Defendant contends, relying on a series of cases beginning with *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1185, that such a fine cannot be imposed on a sentence of life without parole, because such a sentence does not include a period of parole.

Respondent contends the Supreme Court distinguished the *Oganesyan* line of cases in *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 (*Brasure*). In that case, a defendant was sentenced to death and to separate determinate terms for other crimes. The court stated that *People v. Oganesyan, supra,* 70 Cal.App.4th 1178, "is distinguishable as involving no determinate term of imprisonment." (*Brasure, supra,* at p. 1075.) Noting that the defendant before the court was, "to be sure, … unlikely ever to serve any part of the parole period on his determinate sentence," a period of parole "was included in his determinate sentence by law and carried with it, also by law, a suspended parole revocation restitution fine." (*Ibid*.)

Defendant contends *Brasure* is distinguishable because the determinate sentences in that case were, at least in part, consecutive to the death sentence. (See *Brasure, supra,* 42 Cal.4th at p. 1049.) The court's discussion in *Brasure* does not recognize such a distinction. Instead, the parole revocation fine is a part of the determinate sentence, whether that sentence is concurrent or consecutive and, in fact, whether defendant has any likelihood of ever being admitted to parole. (*Id*. at p. 1075.) In addition, the court stated: "Defendant is in no way prejudiced by assessment of the fine, which will become payable only if he actually does begin serving a period of parole and his parole is revoked." (*Ibid*.)

Disposition

The judgment is affirmed.

_____
VARTABEDIAN, Acting P. J.

I CONCUR:

_____
HILL, J.

GOMES, J., Dissenting.

From time to time our criminal justice system is called upon to morph; to transform by outside pressures. Examples include threats of international or domestic acts of terror, new violence-inducing narcotics, dangerous drugs and chemical compounds, open gang warfare in populated areas, violent and predatory deviant sexual offenses, and crime in the streets. The system morphs. This is understandable, fair and just in a republic. What is *not* fair and just is self-imposed degradation of due process for the sake of expediency.

In this case, the majority is using standards more akin to a booth review of instant replay at a sporting event. The record is not in dispute. Contrary to the trial court's finding, juror misconduct occurred. The mandated presumption of prejudice was not rebutted; not by reinstructing with the same instructions the jury had already heard and received in written form; not by 15 minutes of deliberation.

When we, as a system, judge not the facts of an act, but the culpability of the actor, our charge is to do it right. Replay fourth down. I respectfully dissent.

GOMES, J.